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**IN THE
COURT OF APPEALS OF INDIANA**

VAN'S TV & APPLIANCE, INC., VAN S. DICK and)
DOUGLAS A. DICK,)

Appellants,)

vs.)

WIGGS REALTY COMPANY OF INDIANA, INC.,)

Appellee.)

No. 17A03-0607-CV-333

APPEAL FROM THE DEKALB CIRCUIT COURT
The Honorable Kirk D. Carpenter, Judge
Cause No. 17C01-0510-CC-72

November 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Van's TV & Appliance, Inc., Van S. Dick, and Douglas A. Dick (collectively, "Van's") appeal the trial court's denial of their Indiana Trial Rule 60(B) motion to set aside a default judgment obtained by Wiggs Realty Company of Indiana ("Wiggs"). Van's presents a single issue for our review, namely, whether the trial court abused its discretion in refusing to set aside the default judgment because Van's established a prima facie meritorious defense.

We affirm.

FACTS AND PROCEDURAL HISTORY

Wiggs and Van's are Indiana corporations with their principal places of business in Auburn. On April 6, 1995, Van's became a tenant of Wiggs under a lease agreement. That lease provided in part that tenants were responsible for the costs of common area maintenance. In 2004 and 2005, Wiggs paid for parking lot maintenance and submitted to Van's expense reimbursement demands. Van's refused to pay on the demands, asserting that the expenses were capital expenditures rather than maintenance expenses. Van's vacated the premises at the end of the lease in June 2005. Wiggs submitted a bill to Van's in the amount of \$8,719.51 for the 2004 work and \$3,113.93 for the 2005 work.

Wiggs filed a complaint against Van's in the DeKalb Circuit Court on October 28, 2005, to recover for the unpaid fees plus interest. Wiggs failed to serve the complaint on Van's counsel. Wiggs knew of Van's representation by that counsel at the time of the filing of the complaint. Van's subsequently failed to appear in the trial court,

and the court entered default judgment. Van's counsel then moved to set aside the default judgment pursuant to Indiana Trial Rule 60(B).

During a hearing on that motion, Van's counsel clarified that his clients did not dispute that Wiggs was entitled to judgment, but only the amount due to Wiggs. In support, Van's submitted the affidavit of defendant Douglas Dick ("the Affidavit"), in which Dick stated:

Your Defendants have a meritorious defense to the claims made by the Plaintiff; a substantial portion of the claim, i.e., three thousand one hundred thirteen dollars and ninety-three cents (\$3,113.93) is for common area assessment fees. The Defendants never received an accounting for those common area assessments and do not believe they accurately reflect assessments that would be due and owing per their contract with the Plaintiff. The balance of eight thousand seven hundred nineteen dollars and fifty-one cents (\$8,719.51) is for the resurfacing of the parking lot at the strip mall where the Defendants leased from the Plaintiff. The Defendants contend that said resurfacing of the parking lot is part of an overall makeover of the strip mall and is a capital expenditure by Wiggs and not common area maintenance that is assessable to the Defendants' per the Lease Agreement between the parties.

Appellants' App. at 72. The trial court, over the objection of Van's counsel, also allowed Wiggs to present evidence. The trial court then denied Van's motion. This appeal ensued.

DISCUSSION AND DECISION

Van's contends that the trial court abused its discretion when it refused to set aside the default judgment. A default judgment is disfavored, and any doubt of its propriety must be resolved in favor of the defaulted party. Comer-Marquardt v. A-1 Glassworks, LLC, 806 N.E.2d 883, 886 (Ind. Ct. App. 2004). Indiana law strongly prefers disposition of cases on their merits. Coslett v. Weddle Bros. Constr. Co., 798

N.E.2d 859, 861 (Ind. 2003). Generally, however, a trial court's decision to set aside a default judgment is entitled to deference and will be reviewed for an abuse of discretion. Id. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misinterpreted the law. Marshall v. State, 832 N.E.2d 615, 623 (Ind. Ct. App. 2005), trans. denied. A default judgment may be affirmed by any theory supported by the record. Anderson v. State Auto. Ins. Co., 851 N.E.2d 368, 370 (Ind. Ct. App. 2006).

Van's contends that "[t]his case is controlled by Indiana precedent set forth in Smith v. Johnston[,] 711 N.E.2d 1259[] (Ind. 1999)." Appellants' Brief at 3-4. In Smith, our supreme court set aside the trial court's entry of default judgment where the complainant had knowledge of the defendant's representation by counsel but failed to serve that counsel, and the defendant provided a prima facie showing of a meritorious defense. Specifically, the court stated:

In addition to showing sufficient grounds for relief under Trial Rule 60(B), [the defendant] must also make a prima facie showing of a meritorious defense. In the context of this case, [the defendant] must present evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the default to stand. . . . A prima facie showing is one that will prevail until contradicted and overcome by other evidence.

Id. at 1265 (citations omitted). The Smith defendant satisfied the showing of a prima facie meritorious defense by offering the affidavit of a third party expert witness.

Here, Wiggs does not contest that the first prong of the Smith test was satisfied when Wiggs failed to serve the complaint on Van's known counsel. Hence, we turn to the second prong: whether Van's presented evidence that, if credited, demonstrates a

different result would be reached if the case were retried on the merits. See id.; Anderson, 851 N.E.2d at 371.

As we recently observed in Anderson, “[t]he rationale for the meritorious defense requirement is to prevent the waste of time and resources in the performance of a useless ritual.” Anderson, 851 N.E.2d at 371. Further, “while the movant must not prove absolutely the existence of a meritorious claim or defense, there must be a showing of enough admissible evidence to make a prima facie showing of a meritorious defense.” Id. That is, “[t]here need not be a showing of absolute entitlement to the relief sought, but must be enough admissible evidence to satisfy the trial court that there is merit in setting the judgment aside.” Id. “The real issue involved in establishing a meritorious defense is whether the factual circumstances of the [tortious incident] itself would relieve the moving party of liability.” Id.

The only evidence offered by Van’s to establish a prima facie showing of a meritorious defense was the Affidavit. Specifically, the Affidavit raises three putative defenses: that Van’s never received an accounting for the assessments, that Van’s believed any such accountings to be in error, and that the expenses were capital expenditures by Wiggs and therefore not assessable against Van’s. We agree with the trial court that that evidence is insufficient to establish a prima facie showing of a meritorious defense.

Even after giving credit to the relevant portions of the Affidavit, Van’s does not demonstrate how doing so would relieve it of liability. There is no clear connection between either the receipt of an assessment or a belief that an assessment is wrong and

the fact of liability under that assessment. Also, while at first blush Van's contention that the expenses were capital expenditures and not common area maintenance costs is a potentially significant question of contract interpretation, the uncontroverted evidence in the record demonstrates that Van's never objected to the classification of such payments as "common area maintenance" in the past. "This course of conduct, which is undisputed, is a reliable guide to determine the contract's meaning, and we accept it as such." Highhouse v. Midwest Orthopedic Inst., P.C., 807 N.E.2d 737, 739 (Ind. 2004). Consequently, Van's would not be absolved of liability under the lease based on that argument.

On the other hand, there is evidence in the record that supports Wiggs' position. The lease clearly marked parking areas under "common usage." Appellants' App. at 10. As suggested above, Harry Singer, President of Wiggs, testified that the itemization of common area expenses has always included parking area expenses, and that Van's had never objected to payment of such expenses as common area maintenance in the past. Also, Dan Dickey, a third party expert called by Wiggs, testified that the expenses in question "always [are] a maintenance item and never a capital expense." Id. at 130.

Finally, to the extent that Van's responds by challenging the legitimacy of the trial court's evidentiary hearing, such a challenge is not well-founded. Indeed, the trial court, in ruling on a Rule 60(B) motion, was required to "hear any pertinent evidence." Ind. Trial Rule 60(D). Based on the evidence presented at that hearing, we cannot say that the trial court abused its discretion in denying the Rule 60(B) motion.

Affirmed.

KIRSCH, C.J., and DARDEN, J., concur.